Articles

AN INTERVIEW WITH THE COMMISSIONER OF COMPETITION, JOHN PECMAN, AND BRIAN A. FACEY OF BLAKE, CASSELS & GRAYDON LLP[1]

(with an introduction by Professor Roger Ware)

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The Commissioner of Competition, John Pecman, gives a rare and on-the-record interview to Brian A. Facey of Blakes, in which the Commissioner outlines his priorities in the coming term. During the interview, the Commissioner describes the Competition Bureau's approach to transparency, its increased coordination with other regulatory agencies and international counterparts, and the intersection between competition law and foreign investment review. The interview concludes with a discussion about the Bureau's ongoing examination of the intersection between competition law and intellectual property rights and the state of the immunity and leniency programs in Canada.

Le commissaire à la concurrence, John Pecman, accorde une rare entrevue officielle à Brian A. Facey de Blakes, dans laquelle il présente ses priorités dans le mandat à venir. Au cours de l'entrevue, le commissaire décrit l'approche adoptée par le Bureau à l'égard de la transparence, sa coordination accrue avec d'autres organismes de réglementation et homologues étrangers, et la relation entre l'examen de la concurrence et des investissements étrangers. L'entrevue se termine avec une discussion au sujet de l'examen, actuellement réalisé par le Bureau, de la convergence existant au Canada entre le droit de la concurrence, les droits de propriété intellectuelle, l'immunité et le programme de clémence.

Roger Ware: Ladies and gentlemen, I am delighted to introduce the Commissioner of Competition at this 2013 Fall Conference.

For those of you that do not know me, I am a professor of economics at Queen's University and also an affiliate at Analysis Group. Analysis Group has a large network of expert affiliates across the U.S., Canada and other countries, such as China, with specialities in a variety of fields ranging from antitrust and regulation, to energy, marketing, finance, pharmaceuticals and others. It is the largest private economic consulting firm in North America with over 500 professionals and has been operating for over 30 years. Analysis Group staff members have worked on thousands of cases, including many of the large, high profile antitrust cases.

It is a particular pleasure to introduce John Pecman because John is the first economist to be appointed Commissioner. I am confident that once the superiority of economists in all tasks is once again revealed, all future Commissioners will be drawn from the same exotic species!

I have known John a long time because we worked together on the *Interac* case,[2] when I held the T.D. MacDonald Chair at the Bureau in the early 1990s. He has held many positions in his 29 years at the Bureau and has excelled at all of them, as I am sure he is excelling now that he has finally risen to the summit.

While looking for a copy of John's CV, I Googled him and discovered that indeed a picture is worth a thousand words. We were hoping that we could find a way of putting his picture up on a projector, but there is no projector in here. So I invite all of you to Google John Pecman on your phones or on your iPads and you will see a wonderful collage of images of chocolate candy, plastic cards, airplane flights, water heaters and real estate, of course!

Brian Facey, who will be interviewing John, is well known to most people in this room and is widely recognized as Canada's most prominent competition lawyer or certainly one of a very small handful. He has been honoured with many awards and has authored many scholarly publications, including two texts on competition law.

Without further ado, please join me in welcoming Brian Facey and the Commissioner of Competition, John Pecman.

John Pecman: Bonjour à tous. Merci beaucoup. Thank you very much, Roger.

Good morning everyone. Thank you for having me here this afternoon. It is a pleasure to be here with you.

This is my first serious public speaking engagement since my appointment. If you had asked me slightly more than a year ago whether I would be standing here as the Commissioner of Competition, I would have said that you were absolutely crazy. It was not something that was on my career trajectory, and for those of you familiar with the appointment of Commissioners, historically they have come from outside the organization after spending perhaps a year or so in the Mergers Branch, for example. Someone who has worked his way up from the ranks in the organization has never reached that position and historically it has been thought there was a glass ceiling, if you will. So, from that perspective, I never thought it was possible.

My wife has described it as a black swan event in that it is a big surprise, an economist, an insider, but then after you think about it, it makes a lot of sense in that someone who understands the organization, understands the people, knows the issues – it is very much like any law enforcement agency, often the commissioners have worked their way up through the organization. From that perspective, it is not a big surprise. But it would not have happened without the support of so many people here today also working in this field.

First of all, the team at the Competition Bureau helped develop an amazing vision and a new approach that was implemented when I became the Interim Commissioner, and they were so supportive of me pursuing the position. A heart-felt thanks to them.

Tremendous support from the Bar – there are a number of you who encouraged me to apply for the position – again, something I would not have thought to do. Even though I am an economist, I had a lot of support from the legal community. Thank you as well.

Last, but not least, learning the ways of the Bureau, it is a cult. It is a passion. Developing that passion to protect and promote competitive and innovative markets, it is something that becomes ingrained in you over time. I have had the pleasure of working for so many great former and current colleagues, managers and the former Commissioners that have inspired me and helped develop my passion.

I wanted to start today by thanking all the participants in my development who made today happen in my career.

I also had the pleasure of speaking at the Spring Conference in Toronto where many of you were in attendance and those of you who were there may recall that I began my remarks with a theoretical discussion about the number of lawyers required to change a light bulb.

To be fair, I thought I would begin my remarks today with a follow-up, dealing with the same spirit, but pertaining to economists.

So, in that vein, how many economists does it take to change a light bulb? Well, on the one hand, if the light bulb needed changing, the market would have done it already. On the other hand, seven, give or take 10!

I wanted to be clear that I am an equal opportunity humourist, and that not all of my humour comes at the expense of the legal community. Though there are many perceptions and stereotypes about the legal profession, there are equally as many about economics and the economists who call it their profession.

In fact, when I told my parents, who are hardworking immigrants from Slovenia, that I was going to study economics, they were a little perplexed. They worked hard. They invested in my education, and thought I would take on the calling of a doctor or a lawyer or a priest. They could not understand it. I said to them, look, it all worked out for Mick Jagger!

We are trying out a new format this year. Instead of the usual speech, I am going to begin with a few brief remarks, some highlights really, and then we are going to move to a more interactive approach, one

where Brian Facey and I will have an exchange in a question-and-answer format.

With that, I want to provide you with a short update on some of the recent developments at the Bureau.

If you have heard me speak in the last 12 months, then you have heard me speak about my vision to build a "Bureau without Borders," one where the Bureau's enforcement reach is not strictly limited by its resources or constrained by international or domestic jurisdictional boundaries.

One important aspect of the "Bureau without Borders" involves collaborating with our stakeholders to promote compliance with the *Competition Act*.[3] All of us – the Bureau, the legal community and the business community – have a responsibility to promote compliance.

The Bureau promotes compliance through a wide variety of tools, such as publications, advocacy, suasion and enforcement. The legal community provides and promotes compliance by making clients aware of their obligations under the *Competition Act*. The business community promotes compliance by putting in place, and following, credible and effective compliance programs. This is something that I like to call the shared compliance approach.

Through shared compliance, we can achieve immeasurably more than we ever will do alone, to the benefit of consumers, business and the economy.

For example, shared compliance helps to ensure fair play in the marketplace, which levels the playing field and results in increased economic development. This is another example of the whole being greater than the sum of its parts.

A good example of shared compliance, since I have become Commissioner, involves the recent variation of the Consent Agreement with Interac referred to earlier.[4] In that case, the parties worked together throughout the variation process, including drafting a joint response to questions received from the Tribunal.

Regarding our credit card file, we recently decided not to appeal to

the Tribunal's ruling,[5] but instead will focus our efforts on identifying alternate means of addressing the competition issues in the supply of credit card services in Canada. I remain hopeful that we will be able to work collaboratively with Visa, MasterCard and others in the credit card industry to achieve a result that is beneficial to both Canadian consumers and merchants alike.

Another good example of a shared compliance is our recent Consent Agreement with Agrium, which will preserve competition in the retail supply of certain fertilizer products in Alberta and Saskatchewan.[6]

There are many other examples of shared compliance over the past year, including: the Consent Agreement with Air Canada and United/Continental;[7] the Consent Agreement with Waste Management and RCI;[8] the Consent Agreement with BCE and Astral;[9] the Consent Agreements with Hyundai and Kia;[10] the guilty plea by Hershey in the chocolate matter;[11] the guilty pleas by Yazaki and Furukawa in the motor vehicle components case;[12] the guilty pleas by Cathay and LATAM in the air cargo matter;[13] and the guilty plea by JTEKT in the bearings matter.[14]

Further, in order to promote my objective of shared compliance, the Bureau will be updating and rebranding the *Conformity Continuum*[15] and the *Compliance Bulletin*.[16]

To that end, I am pleased to announce that we will be establishing a working group to solicit views on our approach. We look forward to collaborating with the CBA and other stakeholders on this very important initiative.

Je vais maintenant parler de certaines de nos récentes initiatives au sein du Bureau.

Depuis que j'ai assumé le rôle de commissaire par intérim à l'automne dernier, j'ai répété dans presque tous mes discours que la transparence, la certitude et la prévisibilité sont essentielles à notre réussite future.

En fait, j'ai identifié que l'une de nos principales priorités est l'application de nos lois d'une manière transparente et prévisible.

Since assuming the role of Interim Commissioner last fall, I have reiterated in almost every speech that transparency, certainty and predictability are essential to our future success.

In fact, I identified applying our laws in a transparent and a predictable manner as one of our key priorities. I also indicated that one of the ways we would be delivering on this was through an *Action Plan on Transparency*.[17]

At the Spring Forum, as part of an effort to deliver on that priority, I announced the details of our *Action Plan on Transparency*. Part of this plan included a commitment to continuing to consult on important issues and to develop guidance concerning investigations and stakeholder communications.

Today, I am pleased to announce that we are releasing a draft bulletin on *Communications during Inquiries* for consultation.[18] This bulletin provides an overview of how we typically communicate during an inquiry with the parties, with other stakeholders and with the broader public.

Our short-term goal is to receive input that will assist us in identifying potential areas where our communication efforts during an inquiry could be improved. Our long-term goal is to promote the development of a more transparent, efficient and responsive agency.

The consultation will run until the end of the year, with a view to issuing the final bulletin early in the new year. We are inviting comments from all Canadians and would encourage interested parties to provide us with their thoughts.

We recently updated our *Confidentiality Bulletin*,[19] which outlines our approach to the communication of confidential information obtained in the course of the administration and enforcement of the *Competition Act*. This update was necessary to reflect amendments to the *Competition Act*, as well as changes to how we conduct our work, including the creation of the Mergers Registry,[20] and the introduction of our *Criminal Cartel Whistleblowing Initiative*.[21]

On the subject of our Immunity and Leniency Programs, you will

likely have noticed that we have updated the FAQs to these programs.[22] We updated these FAQs to address a variety of additional topics, to bring them in line with current practice and to align the language in them. In keeping with our collaboration initiative, we consulted extensively with the CBA and others.

The FAQs address new topics, such as how the Bureau treats immunity and leniency markers in the context of investigations we do not intend to pursue, and expand on and clarify existing topics, such as how we determine fines in the context of bid-rigging and international market allocation agreements.

These FAQs, coupled with the Immunity and Leniency bulletins,[23] provide a comprehensive picture of our approach to immunity and leniency applications, which are among our most powerful tools to combat anti-competitive agreements.

As you may have noticed, last month we launched a public consultation to gain insight from Canadians about where they believe the Bureau could be playing a targeted role in advocating for greater competition.[24] This is a follow-up to our commitment to increase our use of strategic interventions.

I have been clear that I believe we have an important role to play in advocating for more competitive markets in Canada. We will continue to advocate to regulators and policy makers that they regulate only where necessary and that they rely on market forces as much as possible to achieve the benefits of competition.

This consultation is intended to inform that work. We will continue to receive feedback until November 8, 2013, at which point we will gather the input that we have received and assess potential projects.

In doing so, we are going to ask the following questions:

- Will our efforts have clear, tangible benefits for consumers?

- Will we be contributing in a useful way?

- Does an effective forum exist for the Bureau to present its findings and is there a level of interest from consumers?

- Will we be able to gauge the impact of our advocacy efforts?

We have had great feedback so far, and I invite all those interested to access our online advocacy forum.

Before I close and move to the Q&As, I want to say something – something to those of you who are hoping to ride the Marrakesh Express to the next ICN Conference in April. There is going to be a bit of work ahead for you before you can board that train.

The Bureau is limited in the number of non-governmental advisors that it can invite to the conference and we have, in fact, exceeded our limit in recent years. This is partly due to our less formal approach to selecting invitees. Going forward, that is going to change.

We will be implementing a selection process that will look at four factors that will include things such as whether the candidates play an active leadership role within the ICN or a working group, or whether they have a specific role at an ICN event.

We will also look at ensuring a fair rotation of representation and ensuring diversity in the representatives among all stakeholders.

I would strongly encourage interested parties to make use of the NGA toolkit that has been provided to all stakeholders in the competition law community.

Now, without further ado, we are going to move on to the Q&A session, Brian. Thank you very much.

Brian Facey: Let me begin by saying that you have made a number of changes since you have come to lead the Bureau – changes that are not quite as visible to the outside. For example, you have brought back Richard Taylor as T.D. MacDonald Chair, Bill Miller as Special Enforcement Advisor to the Commissioner, and others. You have given more power to the Deputy Commissioners. You have reinvigorated some of the internal committees at the Bureau, something you called

a "cross-Bureau approach." I thought I would give you an opportunity to explain to this audience that does not see the inner workings what those changes really mean and how they might affect cases.

John Pecman: That is a fair description of some of the changes that we have made. I described them at the Spring Forum as a way of making the organization more horizontal, empowering not only the Deputy Commissioners, but the officers who investigate, while at the same time having these cross committees so others, including the Commissioner, have a view of what is happening.

The intent was to start knocking down the silos between branches. We have found over that time that many branches were working independently of other branches, notwithstanding that there could have been crossover issues. I thought it was very important that, again, we work without borders, even internally – it is not just an external phenomenon that I am talking about.

Empowering the staff was important and not having a top-down, command-and-control model. It is generating huge dividends. Those of you in the Bar have probably seen an increased level of activity by the Bureau. We have a number of ongoing investigations, many in the pipeline that are going to be coming to fruition very soon, and a number of matters being litigated. I also think that the Bureau embraced this approach and we are seeing benefits.

We have also asked the organization to consider staff exchanges with other partners, such as the Canadian Radio-television and Telecommunications Commission (CRTC), the Investment Review Division of Industry Canada (Investment Canada) and Industry Canada. We have a couple of interchange opportunities with the Organisation for Economic Co-operation and Development (OECD), and the French Autorité, to stop being so "siloed." As I said, it is a work in progress, but I think in the long run we will see huge benefits as we will become more diverse and broader in our perspective.

Brian Facey: How have your priorities changed since your appointment?

John Pecman: For those who have read my previous speeches, it is quite clear that we are focusing on three areas. First, the enforcement space:

ensuring that we have focused enforcement and moving incrementally into regulatory interventions. Second, applying the law in a transparent and predictable fashion. Third, building trust through collaboration.

Those core priorities remain, but they are evolving. We are looking to implement those priorities through what I call the four "Cs." The first "C" is *compliance* – compliance through the shared compliance approach I referred to earlier, coupled with strong enforcement, which is the stick to ensure that compliance is going to occur. That is the vehicle that we would like to pursue. But when that fails, we need to have the stick as the backdrop.

The second "C" is *collaboration.* This means continuing on the "Bureau without borders" theme, both internally and externally by working closely with our partners domestically. This includes our police partners in implementation of the consumer protection legislation. We have seven partnership arrangements with respect to this line of business. We also have arrangements that we have set up recently with the CRTC and Public Works and Government Services Canada (Public Works). We are looking where we can collaborate and also put out a document that shines the light on what is the nature of that relationship.

There are other areas that we will be pursuing and there could be more work done with Investment Canada, for example. We are also considering an MOU with the Canadian Intellectual Property Office (CIPO), which is the intellectual property group that is housed in our building. Given the importance of intellectual property (IP) and the emerging IP issues, it is important that we have that relationship.

Internationally, we will continue to deepen our relationship and our working relationship with the Americans, the Europeans, the Australians and the Office of Fair Trading (in the U.K.). We will also provide technical assistance and work more closely with some of the emerging areas, particularly in Latin America. I think you will see some focus from us there as well.

I would also like to see us as an integrated enforcer, integrated in that we are not standing alone; we work collaboratively with other agencies, with other partners.

I do not think I mentioned the intersection with other regulatory authorities that also look at mergers, for example, trying to make that space clearer, trying to minimize redundancy and work more collaboratively with them as well.

The third "C" is *communication.* You will likely see more of my Deputy Commissioners and Assistant Deputy Commissioners out talking about the Bureau, promoting what we do, communicating more and listening to what the issues are. I think it is important, it is vital. I know I spent a lot of time when I was Interim Commissioner speaking with various law firms and their clients and being on the road, hearing about the issues. I mean if we are housed up in Gatineau, we are not going to understand what the real issues are and so we are going to continue to push ahead with that.

Advocacy is another part of this. Specifically, advocating for open markets. As you are aware, a good portion of our economy is still regulated and where open markets will work, we will continue to advocate for that. Again, that whole communication piece is going to be key.

Last, but not least, the fourth "C" is what we are currently calling *Canadians* – it could evolve – but basically that means strengthening the Bureau so we can better promote and protect competition and innovation. In strengthening the Bureau, we are looking at our current alignment in the organization: are we properly structured with the new amendments? Are we properly structured to move into advocacy? Are we properly structured to move into other areas that government may want us to move into?

We are looking at our funding as well. As a result of austerity measures, we have had to close three of our regional offices. Our budgets are being cut. Our costs are increasing on a regular basis. We have relied more heavily on our in-house counsel. The Department of Justice has done a great job building a litigation team, relying on our Crown counsel. So that has helped with our cost piece, but it is a real and present danger for us, as we have an important mandate. We want to look at alternatives for funding and the possibility of a self-funded model, increasing user fees or identifying other user fees so we are not relying exclusively on the government.

When I talk about strengthening the Bureau and Canadians, I am talking about just that – and then, obviously continuing to look at our framework. Are there gaps? We have had recent decisions that suggest that we still have some work to do in terms of strengthening our law, and so we will do that as well going forward.

Brian Facey: On the issue of "gaps," do you anticipate legislative changes going forward?

John Pecman: Potentially. Again, we are not in control of that. We advise Industry Canada and the government on framework changes where appropriate and, where necessary, we will continue to do that.

Brian Facey: You have given me a lot to work with. I am going to come back to Investment Canada and the CRTC. But you mentioned transparency as well. Can you unpack the *Action Plan on Transparency* for us?[25]

John Pecman: Transparency. Well, this is a theme not only in Canada, but elsewhere. For those of you following the International Competition Network (ICN), it was one of the significant initiatives undertaken last year. As a result, all the agencies involved have become more transparent in how they operate. This means having more predictability and more certainty for practitioners so they can understand the agencies and where we are headed. It means clearly articulating priorities and working with stakeholders in developing policies, procedures and programs. We are going to continue to do that.

With regard to the Bureau, the current draft bulletin on transparency that we have released provides a road map into how we will conduct our investigations, both on the criminal and civil side. It is a start and we are looking for feedback. We also have to be careful not to give up our discretion – give up some of the privileges that we currently have as an investigative body. We want to do a balancing act on that front. We are being careful. If it is modest, that may be a part of it, and we would like to have a discussion about that. How can we, again, be more transparent and more predictable so that practitioners understand who they are dealing with when they come to the Bureau?

Brian Facey: I want to ask you about predictability. I am going set out a

hypothetical situation. Let us say that you are working on a proposed transaction, but you think the parties may need to offer up remedies to address an issue. The parties want to offer up a remedy soon because it is a "public markets transaction."

Previously, the parties could approach the Bureau and engage in a consultation. But that is something that fell by the wayside for a while. Counsel is very often asked: can you go to the Bureau in advance in an uncertain situation and discuss a case with them, including remedies? How much comfort can you get?

John Pecman: Well, again, I talk about shared compliance. I have also spoken about the appetite for a fix-it-first approach – working in collaboration with the merging parties to identify very early what the issues are and then correct them together. That is the ideal.

So in that vein, we are open for business prior to the announcement of a transaction to start the dialogue. If my memory serves me correctly, we are currently doing it in one particular transaction or have done it and we will continue to be open to that.

There are some caveats. The quality of the discussion will reflect the information that is being provided to us. If we are not getting full and frank disclosure of the relevant information, it is going to limit what we can say. Clearly, any final position will be that there will be no final positions. We need to get to the market with any proposed solution or remedy with regard to a merger transaction. So you could not expect to get a final approval from us before we go to market to test drive a proposed resolution as well.

But all this to say that this fits in perfectly with the shared compliance objective I see for our organization.

Brian Facey: In terms of other jurisdictions, you mentioned another pillar of your collaboration is dealing with other agencies. You have seen it in the Fair Business Practices and Mergers branches. I wanted to ask you in particular about cartel work. Is there an increasing trend in terms of coordination with your counterparts in other countries? How is that relationship working?

John Pecman: There has been a significant amount of development on the international cartel front in terms of having agencies in developing countries come up with approaches that are going to protect confidentiality. They have come up the learning curve on how to conduct dawn raids and how to seek information. They are more frequently being part of our investigative processes at the very early stages.

The short answer is we are seeing more international collaboration, including with agencies such as Brazil, Mexico and others that have not traditionally been part of investigations. The immunity and leniency process coupled with the exchange of waivers enables us to share very sensitive information at early stages so that we can coordinate dawn raids and information requests.

For those of you that practice in the area, you are seeing it. We are working in a coordinated fashion. Investigations break together simultaneously. For those of you that have participated in the ABA Cartel Working Group Conference that is held every two years, it is a simulation of exactly how it plays out, and it is true to form. There is a tremendous amount of cooperation. As the former head of the ICN Cartel Working Group Investigative Techniques Group, we regularly hold workshops; one is going to take place in Capetown next week. Senior Deputy Commissioner, Criminal Matters Branch, Matthew Boswell is going to be co-chairing that program. It is another forum where we get together and talk about our techniques and; how we can work better together.

All this to say, we have "pick-up-the-phone" relationships. We are very tightly knit with other agencies, and I think that is the wave of the future. "Cartels" are but one example. We are seeing the same thing on the mergers side. Our mergers group works very closely with the Federal Trade Commission (FTC) and the U.S. Department of Justice. We have held a number of workshops at the officer level to talk about techniques and processes and how best to work together. I think that is a wave of the future. Civil Matters Branch is now starting to do a bit of that. Of course, the leaders in this area have been the Consumer Protection Group where, through International Consumer Protection and Enforcement Network (ICPEN) and other international fora, not only are they talking about techniques, they are talking about sharing intelligence and where to attack mass marketing fraud and telemarketing

fraud together. They have their annual sweep where they are jointly investigating, after gathering their intelligence where they want to focus their energies. For me, this is another excellent example of international cooperation in the area of not just antitrust, but in consumer protection as well.

Brian Facey: What about coordination within Canada as between different regulatory bodies? You have recently announced a new Letter of Agreement with the CRTC.[26] Can you speak about how the Bureau is cooperating and coordinating with other regulatory agencies, including perhaps touching on your recent accord with the CRTC?

John Pecman: Early in my term as Interim Commissioner, the Bell/ Astral merger made it clear that there are multiple agencies looking at the same transaction and, in fact, the CRTC opined on competition issues in its first decision in which it blocked the transaction. This suggested to me and to the Bureau that we have to work with these other agencies; and I should note that we have historically had an MOU with the CRTC. It was a cooperation agreement, but it did not deal with some of the core issues in terms of working more collaboratively, for example, exchanging confidential information, and so a framework change is necessary.

In our more recent MOU, cooperation is the first step. It is a baby step. We are talking about staff exchanges and some form of public communication of information early in joint reviews. We are talking about biannual meetings at the senior management level to discuss policies and procedure. But what needs to be done to make that relationship much more coherent between our two agencies is to have some framework change that will allow us to exchange confidential information. Right now there is an impediment. We have taken a first step, but our view is that we would like to move towards a more shared approach, and so if the government is open to a framework change, we would be very receptive to that.

Regarding Transport Canada and the Canadian Transportation Agency, we have reached out to them to try to establish a similar relationship. It is still early days. I know that [former] Deputy Commissioner Vicky Eatrides in my office has been working hard to make some

inroads there.[27] We, of course, have some overlap in merger review and in some other areas as well.

I mentioned CIPO and we also recently signed an MOU with Public Works,[28] which, again, codified the relationship we have had with them for many, many years in terms of investigating bid-rigging. Public Works is by far the largest procurer of goods and services in Canada and, from time to time, suspicions of bid-rigging arise and they bring that to our attention. We have spent a great deal of time creating awareness and educating Public Works officials on what to look for so that they can bring these matters to us, and we can proceed to full investigation and possibly prosecution in order to protect the taxpayer and all of us against higher prices for the government. We all pay for those types of transgressions.

We have taken a number of initiatives. As I said, internationally Canada is in discussions regarding several free trade agreements. They all have competition chapters that contemplate competition. We also have cooperation agreements between competition agencies. We have 11 in force right now. Recently, we had a visit from the Japan Fair Trade Commission (JFTC). An excellent bilateral meeting took place where we discussed, among other things, compliance. The JFTC has done tremendous work in this area. For those of you that are interested in compliance, they have done a number of surveys of businesses about their uptake on compliance programs and their effectiveness.

In this area, Japan is starting to take the lead internationally. I was very intrigued by that discussion with Chairman Sugimoto. As many of you know, we have a number of joint investigations with them, including the auto parts investigation. All this to say, we have many formal and informal cooperation agreements – and I have not touched on all of them. Again, my organization has been wonderful, trying to reach out to as many organizations as they can to make us more integrated in our approach – and we will continue to do that.

Brian Facey: John, in those areas, you are talking about matters where you are all pulling in the same direction substantively. You mentioned that the Bureau and the CRTC are focused on consumers. It makes sense to adopt a procedure for you to work together to address those issues.

What about with the *Investment Canada Act*?[29] Sometimes, Investment Canada and the Bureau appear to take conflicting substantive approaches. Under the *Investment Canada Act* framework, there is an implied preference for Canadian acquirers, but sometimes the Bureau would rather see an international acquirer that raises fewer concentration issues in local markets. How does Investment Canada engage with the Bureau both on a procedural and substantive level?

John Pecman: The Investment Canada review process is headed by the Minister of Industry and it is housed within Industry Canada. They are the ultimate decision-makers on foreign transactions. The Bureau does play a role during the review by Investment Canada as it includes an assessment of competition – the competitive effects the transaction will have in Canada. We provide that to them, usually as part of our merger review process. The information that we provide them is incorporated into their final decision, but does not have predominant weight. It is ultimately a decision by the Minister. There have been times when we have indicated that particular transactions would not raise competition issues, but nonetheless the government has decided to block the transaction for a number of other reasons, whether based on national security or net benefit.

Again, that is their prerogative. It is more of a political process, if you will, in that it is the Minister that is making the decision, and by definition, the Minister is a political actor. The matter of state-owned enterprises (SOEs) has come to the fore. We have had some issues in that regard and are trying to work with Investment Canada and our international counterparts on how best to deal with this. For us, the greatest challenge is obtaining information – having sufficient information to make a competition assessment of these transactions. Given the way these SOEs are organized, sometimes it is not that easy to collect the information needed to make the assessment.

I know both the OECD and the ICN are focussing on this area. In Marrakesh, there is a special project that will focus on SOEs. Investment Canada wrestled with this issue as well, in the context of the CNOOC transaction and has recently undertaken some changes in terms of its approach.

All this to say – we do have a relationship with Investment Canada. I would like us to come up with some type of a document or process that we can put into the public domain about the nature of our relationship with them.

Brian Facey: Let me turn to the topic of strategic regulatory interventions. You have gone to the public, so to speak, asking if there are areas in which the Bureau can provide input. Could you elaborate on your plans and on how things are going? Are you getting responses back?

John Pecman: Well, I think I will talk a bit about industries because when we did come back to this initiative, as many of you may know, with the implementation of the amendments to the *Competition Act* in 2009, the Bureau focused on enforcement and kind of "down-tooled" in the whole advocacy area. When I was appointed as Interim Commissioner, I recognized this was an important area, and one that we needed to get back into. The Competition Policy Review Panel identified competition advocacy as being an extremely important component to competition policy in Canada. There was a gap. No one was actually undertaking this kind of work, and I thought it was important for us to go back there.

When we did, the Bureau derived with three priority areas for the approach that we were going to take. I should say that, first of all, we needed to build a unit and we wanted to be targeted in our approach. We identified three markets that we could focus on in the first instance.

The digital economy – the Bureau made a submission to the CRTC on the *Wireless Code of Conduct.*[30] I believe this submission was very helpful to the CRTC and I know our work supported the development of a Code that was a bit more consumer friendly; where consumers could more easily and readily switch between providers. The Code also highlighted the need for better information to consumers so they could make informed decisions. Again, that translated from the consumer protection piece that we provided.

This was one of our early successes, one of the early areas on which we have focused. I do not think it will come as a big surprise to anyone that this will likely be an area of continued focus for the Bureau.

Some of the early returns from the information that we were seeking from the market was that this is an area that people are concerned about and one in which they want us to be more active. Based on this feedback, you can expect us to be more active in the digital economy space.

Health is another huge expenditure for governments in Canada; the reason for the shutdown in the U.S. as well. It is a difficult area, but we are going to be fearless and wade into that space. There are a number of issues dealing with pharmaceutical products as well that could fall under that ambit, either from an enforcement or advocacy perspective. We will be spending some time on that front. I want to wait for the outcome of the consultation on what issues are most pressing for Canadians before we make final decisions regarding where we will focus our efforts in this area.

Because it is a new initiative and because we are resource constrained, our involvement will be very targeted. We will ask ourselves: Are we going to make a difference? Does the regulator want to hear from us? There is nothing worse than spending months and a lot of time collecting data and doing an analysis and then finding out that regulator does not want to hear our position or will not give it any time. That is an important piece of this puzzle: does the regulator want to hear from us? If they invite us to participate, that will be an indication of whether or not we should devote resources to that area.

Brian Facey: What about this Public Works MOU that you have implemented? You mentioned it briefly. Can you unpack that as it sounds significant?

John Pecman: I thought it was important to have that relationship become more transparent, to explain to Canadians how we work together, to show that we were focused on education and awareness and also to ensure that we continue to do that. We have made undertakings in that agreement to continue to do that with Public Works. They have offices across the country, so this has been a significant investment. We make educational presentations every year to Public Works staff. We also work together on investigations where bid-rigging is suspected. We want to ensure that there is some feedback to Public Works during – or just before – we proceed with prosecutions,

as they have their own administrative penalty process that penalizes companies and individuals that engage in criminal activity. There are very severe debarment rules now, such as the ones you could find in Quebec and elsewhere, where companies engaging in this conduct are being debarred from bidding for future government contracts. This is a very powerful tool. That is Public Works' response to the enforcement against bid-rigging. We want to make sure that we are feeding into that.

An important takeaway as well from our agreement is the recognition of our Immunity Program. This means that companies that provide information in exchange for immunity will not be debarred from future contracts or bidding for future contracts at Public Works. That was a huge win and significant recognition by Public Works of the importance of the Immunity Program in detecting, investigating and prosecuting bid-rigging and collusion for public contracts.

Brian Facey: I want to ask the "elephant in the living room" question here. You have been talking about increasing advocacy and collaboration which is in contrast to litigation – *TREB*,[31] *Rogers/Chatr*,[32] *Visa/MasterCard*[33] and the *CCS* case[34] which is on appeal to the Supreme Court of Canada. What have you learned from those cases going forward? Have the outcomes in those cases informed your advocacy and collaboration approach?

John Pecman: To a certain extent. As I indicated when I talked about shared compliance, it is in recognition that we have a collective responsibility to ensure markets are competitive and innovative. Where we cannot come together, enforcement will be the tool that we will use and let the courts or the Tribunal decide whether or not we are on the right track.

The cases you identified, they are so varied in terms of the approach. While the decisions to litigate were not mine, I understand many of them were taken to clarify the law and clarifying the law does not necessarily mean you have to win the case. The Tribunal even pointed this out in the credit cards decision; that it was appropriate for the Bureau to take on what was found to be anti-competitive practices of Visa and MasterCard, again, without that success that you would traditionally see in a litigated case.[35]

As I said, if we cannot work with the parties, enforcement will be the approach that we will take.

In the context of criminal behaviour, when we talk about collaboration and compliance, we are talking about the self-reporting mechanisms of immunity and leniency. It is incumbent upon us to strongly enforce the criminal provisions of the *Competition Act*, given the damage that fraud, price-fixing and bid-rigging do to our economy. We will take a stronger approach to doing so, unless of course parties choose to resolve through immunity or leniency.

So, Brian, it is a difficult question. These are four different cases. We can have a discussion about each one and how that fits in going forward. What I can say is the Bureau wants to work with the business community to resolve issues as opposed to litigating. That is our first choice; that is our default position.

Brian Facey: The *CCS* case is still a live case, so I am not going to discuss it specifically, but it raises the efficiencies defence. I thought it was interesting that Justice Nadon has been nominated to the Supreme Court of Canada and you spent a lot of time looking at him in *Superior Propane*[36] in the courtroom as did I.

John Pecman: A small world.

Brian Facey: Mr. Justice Rothstein is speaking at the dinner tonight. He also rendered judgement in the *Superior Propane* case. Given that you have two judges who are familiar with competition law who are going to be considering the efficiencies defence, I thought I would ask you your personal perspective on the topic.

John Pecman: The arguments that the Bureau put forward in the *Superior Propane* case were intended to advocate for a more consumer welfare approach than was ultimately decided. It is important also to note that our approach is bound by the legislation. The decision, in the end, was for a more balancing weights approach that provides for ensuring consumer considerations are given some significant weight. I have not deviated from that view, if you are asking for my own view.

However, as I said, there is a framework. There is litigation. There is jurisprudence that has come up in the current approach. I am sure that the *CCS* case will provide the Supreme Court an opportunity to solidify the approach taken in *Superior Propane* or tinker with it. I am going to be an interested observer, as you are. It is unclear to what extent they will delve into the issue given that it was more of a process piece, as opposed to the fundamental analytical approach. But again, not that I am an expert on that – on this matter and I am going well beyond where I should go as Competition Bureau Senior General Counsel David Wingfield looks at me talking about this particular matter.

Brian Facey: We are well off script, by the way, in case you were wondering. John, we only have a few minutes left. I am going to ask you about two other areas. One is in the area of patent litigation settlements in light of the recent United States Supreme Court decision dealing with reverse patent settlements in *FTC v. Actavis*.[37] The other area is IP – something that has not been front-and-centre, although I know that some people at the Bureau have been focused on this area. Can you elaborate on the Bureau's current perspective on IP rights? Is it something that is going to be changing going forward?

John Pecman: I would describe IP as an area under construction at the Bureau, quite frankly. It is an area that we have neglected, in my view, for quite some time. We have been watching, as most of us have, what has transpired on reserve payments in the U.S., and we will be informed by that.

Again, our legislation seems to favour IP rights over competition law, in the way it is structured. If companies are exercising IP rights, it often provides a defence to a case involving anti-competitive conduct. We have old IP guidelines that we are looking at modifying from an administrative perspective in phase one, basically updating them with respect to our amendments and keeping them consistent with other guidelines. That will be a minor modification on the IP guidelines.

We are looking at phase two. This phase will be informed by a workshop we are holding in the coming months, which will address pharmaceutical issues. There will be a debate about many of the issues, such as reverse payments, and many IP issues will be discussed. We are looking to have a more substantive review of the IP guidelines in phase

two that would address patent assertions and perhaps even reverse payments. But it is all tied up by the legislation. Section 32, for example, which deals with IP rights directly, is pretty much a defunct section. It does not allow for investigation and has no remedies. My view is that IP needs to have a refresh from a legislative perspective before we get into providing too much guidance because the way the *Competition Act* is currently set up does not allow us to take significant action from my perspective.

Brian Facey: Following the *Maxzone* decision[38] and the *Whistleblowing Initiative*[39] that you have put in place, when, if at all, will we see a focus on individual liability for cartel conduct?

John Pecman: Again, tough question. The amendments – the 2009 amendments that were implemented in 2010 – reflect the government's approach to white collar crime, including cartels. That approach focuses on individual accountability and the amendments imposed a statutory maximum of 14 years in prison. This, by the way, is the highest statutory maximum in the world. We truly believe that to thwart, to fight and to combat cartels and bid-rigging, we need to deal with the individuals who engage in the conduct, as opposed to the company. We do not want resolving these liabilities to be seen as just a cost of doing business for companies. As a result, you are seeing individuals being charged, and the most recent example is in the chocolate case. Three individuals were charged in that particular matter. We will continue to charge individuals. The fact that we are charging individuals also makes our Leniency Program, especially for those that come in first, very attractive, in that there is immunity from prosecution for individuals for cooperating parties.

I should also note that Chief Justice Crampton's decision in *Maxzone* confirmed our Leniency Program. It was the first time that it was endorsed by the court. It also spoke of the gravity of this type of offence. Again, we are completely lined up. I know there was some concern that that decision – or those *obiter* comments – would chill companies from coming forward and using our program because they would have to disclose information – more information during the admissions of the effects of the cartel and allow the plaintiffs more easily to sue.

I have to say that we have not seen that play out at all. Since the *Maxzone* decision, there have been nine guilty pleas before the courts, and in each case, the Crown brought the *Maxzone* decision to the attention of the court. We have managed to work with the guidance from Chief Justice Crampton. There is more information now contained in the admissions, but it has not caused that program to crater. We have also had roughly 40 leniency marker requests since the *Maxzone* decision from nine applicants. For our perspective, the program is continuing to flourish. Individual liability also helps with that.

For those that lose the race for first-in leniency, however, there is exposure for those individuals that were part of the cartel. In these cases, we will recommend to the Crown – it is their decision – to prosecute. And so – now it is up to the courts. First of all, you need to have a finding of guilt and then it is up to the courts to impose those penalties that are being sought by the Crown. I think we are on the right track. We are seeing a bit of that take place in our consumer protection side. We have had some jail time imposed, jail sentences imposed on individuals dealing with misleading advertising. I think it is time that we caught up on the bid-rigging and cartel side.

Brian Facey: John, I think we are about out of time. I want to thank you for giving this interview. In addition to being the first "economist Commissioner," you are the first Commissioner to agree to be interviewed at the CBA Fall Conference, which speaks to the depth of your experience in all the different branches at the Bureau over the years.

On behalf of the CBA, thank you very much.

Roger Ware: As you leave the stage, I wanted to add to what Brian said. I love the new format. I think perhaps it was the comfy chairs, but you two looked like the most relaxed people in the room. I want to extend a warm thanks on behalf of the CBA and of course Analysis Group for that fantastic presentation. Thank you.

Endnotes

[1] John Pecman was appointed Commissioner of Competition in June 2013 for a five-year term. Mr. Pecman is an economist with an M.A. from McMaster University who has worked at the Competition Bureau as an investigator, manager and executive for more than 29 years. During his tenure with the Competition Bureau, Mr. Pecman has held senior management positions

in every major branch, including the position of Interim Commissioner of Competition immediately prior to his appointment. Mr. Pecman also holds a number of international positions, including as a member of the Organisation for Economic Co-operation and Development Competition Committee and the Steering Group of the International Competition Network.
Brian A. Facey is a Partner and Chair of the Competition, Antitrust & Foreign Investment Group of Blake, Cassels & Graydon LLP. He advises on all aspects of competition/antitrust law and foreign investment in Canada, and is highly-ranked in all major surveys as a leading lawyer in these fields. Mr. Facey now holds the position of Past Chair of the National Competition Law Section of the CBA. He also is the co-author of a number of leading treatises on Canadian regulatory law, including: *Competition and Antitrust Laws in Canada: Mergers, Joint Ventures and Competition Collaborations* (2013); *Competition and Antitrust Law: Canada and the United States* (2006); and *Investment Canada Act: Commentary and Annotation* (2013).

[2] *Director of Investigation and Research v Bank of Montreal*, CT-1995-002.

[3] RSC 1985, c C-34.

[4] *Bank of Montreal v The Commissioner of Competition*, CT-2013-003.

[5] *The Commissioner of Competition v Visa Canada Corporation*, CT-2010-010 [*Visa/MasterCard*].

[6] *The Commissioner of Competition v Agrium Inc*, CT-2013-006.

[7] *The Commissioner of Competition v Air Canada, United Continental Holdings, Inc., United Airlines, Inc. and Continental Airlines Inc.*, CT-2012-001.

[8] *The Commissioner of Competition v WM Québec Inc.*, CT-2013-001.

[9] *The Commissioner of Competition v BCE Inc*, CT-2013-002.

[10] *The Commissioner of Competition v Hyundai Auto Canada Corp*, CT-2013-004; *The Commissioner of Competition v Kia Canada Inc*, CT-2013-005.

[11] Canada, Competition Bureau, "Hershey Pleads Guilty in Price-fixing Cartel" (Ottawa: June 21, 2013), online: <http://www.competitionbureau.gc.ca>.

[12] Canada, Competition Bureau, "Record $30M Fine Obtained by Competition Bureau Against Japanese Auto Parts Supplier" (Ottawa: April 18, 2013), online: <http://www.competitionbureau.gc.ca>.

[13] Canada, Competition Bureau, "Cathay Pacific Pleads Guilty to Price-fixing Conspiracy" (Ottawa: June 20, 2013), online: <http://www.competitionbureau.gc.ca>; Canada, Competition Bureau, "South American Company Pleads Guilty to Air Cargo Price-fixing Conspiracy" (Ottawa: August 20, 2013), online: <http://www.competitionbureau.gc.ca>.

[14] Canada, Competition Bureau, "Japanese Bearings Manufacturer Fined $5 Million" (Ottawa: July 12, 2013), online: <http://www.competitionbureau.gc.ca>.

[15] Canada, Competition Bureau, *Conformity Continuum Information Bulletin* (Ottawa: June 18, 2000), online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/continuum.pdf/$file/continuum.pdf>.

[16] Canada, Competition Bureau, *Corporate Compliance Programs* (Ottawa: September 27, 2010), online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CorporateCompliancePrograms-sept-2010-e.pdf/$FILE/CorporateCompliancePrograms-sept-2010-e.pdf>.

[17] Canada, Competition Bureau, "Action Plan on Transparency" (Ottawa: May 28, 2013), online: <http://www.competitionbureau.gc.ca> [*Action Plan on Transparency*].

[18] Canada, Competition Bureau, *Communications during Inquiries* – Draft for Public Consultation (Ottawa: October 3, 2013), online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Draft-Transparency-Bulletin-2013-10-03-e.pdf/$FILE/Draft-Transparency-Bulletin-2013-10-03-e.pdf>.

[19] Canada, Competition Bureau, *Information Bulletin on the Communication of Confidential Information Under the Competition Act* (Ottawa: September 30, 2013), online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-bulletin-confidential-info-2013-e.pdf/$file/cb-bulletin-confidential-info-2013-e.pdf>.

[20] Canada, Competition Bureau, "Monthly Report of Concluded Merger Reviews," online: <http://www.competitionbureau.gc.ca> [Mergers Registry].

[21] Canada, Competition Bureau, *Criminal Cartel Whistleblowing Initiative* (Ottawa: May 28, 2013), online: <http://www.competitionbureau.gc.ca> [*Whistleblowing Initiative*].

[22] Canada, Competition Bureau, "Competition Bureau Publishes Revised Immunity and Leniency FAQs" (Ottawa: September 25, 2013), online: <http://www.competitionbureau.gc.ca>.

[23] Canada, Competition Bureau, *Immunity Program under the Competition Act* (Ottawa: June 7, 2010), online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Immunity-Program-2010.pdf/$FILE/Immunity-Program-2010.pdf>; Canada, Competition Bureau, *Leniency Program* (Ottawa: September 29, 2010), online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/LeniencyProgram-sept-2010-e.pdf/$FILE/LeniencyProgram-sept-2010-e.pdf>.

[24] Canada, Competition Bureau, "Competition Bureau Seeks Input from Canadians on Potential Advocacy Initiatives" (Ottawa: September 10, 2013), online: <http://www.competitionbureau.gc.ca>.

[25] *Supra* note 17.

[26] Letter of Agreement between the Chairman and Chief Executive Officer of the Canadian Radio-television and Telecommunications Commission and the Commissioner of Competition of the Competition Bureau (September 23, 2013), online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Letter-Agreement-CRTC-Competition-Bureau-2013-e.pdf/$file/Letter-Agreement-CRTC-Competition-Bureau-2013-e.pdf>.

[27] Note from the Editors: Ms. Eatrides has since left the Competition Bureau to join the Major Project Management Office at Natural Resources Canada as Director General, Strategic Policy and Planning.

[28] Memorandum of Understanding Between the Competition Bureau and the Department of Public Works and Government Services Regarding the Prevention, Detection, Reporting and Investigation of Possible Cartel Activity (May 30, 2013), online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Memorandum-of-Understanding-2013-e.pdf/$file/Memorandum-of-Understanding-2013-e.pdf>.
[29] RSC 1985, c 28 (1st Supp).
[30] Canada, Competition Bureau, Submission by the Commissioner of Competition before the Canadian Radio-television and Telecommunications Commission, Telecom Notice of Consultation CRTC 2012-557-3, Wireless Code of Conduct Working Paper (February 6, 2013), online: <http://www.competitionbureau.gc.ca>.
[31] *The Commissioner of Competition v The Toronto Real Estate Board*, CT-2011-003. Note: This case has been remitted to the Federal Court of Appeal: 2014 FCA 29.
[32] *Canada (Commissioner of Competition) v Chatr Wireless Inc*, 2013 ONSC 5315, 288 CRR (2d) 297 (Ont Sup Ct).
[33] *Supra* note 5.
[34] *The Commissioner of Competition v CCS Corporation*, CT-2011-002, aff'd 2013 FCA 28 (*sub nom Tervita Corporation v Commissioner of Competition*), 360 DLR (4th) 717 (FCA), leave to appeal to the SCC granted [2013] SCCA No 153, 2013 CanLII 42521 (SCC).
[35] The Competition Tribunal dismissed the application against Visa and MasterCard.
[36] *Canada (Commissioner of Competition) v Superior Propane Inc.*, [2003] FCJ No 151, [2003] 3 FC 529 (FCA), aff'g [2002] CCTD No 10, [2002] 18 CPR (4th) 417 (Comp Trib), on remand from [2001] FCJ No 455, [2001] 3 FC 185 (FCA), rev'g [2000] CCTD No 15 (Comp Trib).
[37] *FTC v Actavis, Inc* (2013), 133 US 2223.
[38] *Canada v Maxzone Auto Parts (Canada) Corp*, 2012 FC 1117, 418 FTR 256 (FCTD).
[39] *Supra* note 21.